UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff, v. YORK CORPORATION, Defendant;	Civil Action No. 7546
UNITED STATES OF AMERICA, Plaintiff, v. ANTHRACITE EXPORT ASSOCIATION, *et al*., Defendants;	Civil Action No. 9171
UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TECHNICAL INDUSTRIES, INC., Defendant.	Civil Action No. 73-246

MEMORANDUM IN SUPPORT OF THE MOTION OF THE UNITED STATES TO TERMINATE LEGACY ANTITRUST JUDGMENTS

The United States respectfully submits this memorandum in support of its motion to terminate the judgments in each of the above-captioned antitrust cases pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The judgments were entered by this Court between 44 and 56 years ago. The United States has concluded that because of their age and changed circumstances since their entry, these judgments no longer serve to protect competition. The United States gave the public notice and the opportunity to comment on its intent to seek termination of the judgments; it received no comments. For these and other reasons explained below, the United States requests that the judgments be terminated.

I. BACKGROUND

From 1890, when the antitrust laws were first enacted, until the late 1970s, the United States frequently sought entry of antitrust judgments whose terms never expired.[1] Such perpetual judgments were the norm until 1979, when the Antitrust Division of the United States Department of Justice ("Antitrust Division") adopted the practice of including a term limit of ten years in nearly all of its antitrust judgments. Perpetual judgments entered before the policy change, however,

[1] The primary antitrust laws are the Sherman Act, 15 U.S.C. §§ 1-7, and the Clayton Act, 15 U.S.C. §§ 12-27. The judgments the United States seeks to terminate with the accompanying motion concern violations of one or both of these laws.

remain in effect indefinitely unless a court terminates them. Although a defendant may move a court to terminate a perpetual judgment, few defendants have done so. There are many possible reasons for this, including that defendants may not have been willing to bear the costs and time resources to seek termination, defendants may have lost track of decades-old judgments, individual defendants may have passed away, or company defendants may have gone out of business. As a result, hundreds of these legacy judgments remain open on the dockets of courts around the country. Originally intended to protect the loss of competition arising from violations of the antitrust laws, none of these judgments likely continues to do so because of changed circumstances.

The Antitrust Division has implemented a program to review and, when appropriate, seek termination of legacy judgments. The Antitrust Division's Judgment Termination Initiative encompasses review of all its outstanding perpetual antitrust judgments. The Antitrust Division described the initiative in a statement published in the *Federal Register*.[2] In addition, the Antitrust Division established a website to keep the public apprised of its efforts to terminate perpetual judgments that no longer serve to protect competition.[3] The United

[2] Department of Justice's Initiative to Seek Termination of Legacy Antitrust Judgments, 83 Fed. Reg. 19,837 (May 4, 2018), https://www.gpo.gov/fdsys/granule/FR-2018-05-04/2018-09461.

[3] *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/JudgmentTermination.

States believes that its outstanding perpetual antitrust judgments presumptively should be terminated; nevertheless, the Antitrust Division is examining each judgment to ensure that it is suitable for termination. The Antitrust Division is giving the public notice of—and the opportunity to comment on—its intention to seek termination of its perpetual judgments.[4]

In brief, the process the United States is following to determine whether to move to terminate a perpetual antitrust judgment is as follows:

- The Antitrust Division reviews each perpetual judgment to determine whether it no longer serves to protect competition such that termination would be appropriate.
- If the Antitrust Division determines a judgment is suitable for termination, it posts the name of the case and the judgment on its public Judgment Termination Initiative website, https://www.justice.gov/atr/JudgmentTermination.
- The public has the opportunity to comment on each proposed termination within thirty days of the date the case name and judgment are posted to the public website.

[4] Given the extensive notice it provided to the public, the lack of public opposition, the age of the judgments, and the relief sought, the United States does not believe that additional service of this motion is necessary.

- Following review of public comments, the Antitrust Division determines whether the judgment still warrants termination; if so, the United States moves to terminate it.

The United States followed this process for each judgment it seeks to terminate by this motion.[5]

The remainder of this memorandum is organized as follows: Section II describes the Court's jurisdiction to terminate the judgments in the above-captioned cases and the applicable legal standards for terminating the judgments. Section III explains that perpetual judgments rarely serve to protect competition and that those that are more than ten years old presumptively should be terminated. Section III also presents factual support for termination of each judgment. Section IV concludes. Appendix A attaches a copy of each final judgment that the United States seeks to terminate. Finally, Appendix B is a proposed order terminating the final judgments.

[5] The United States followed this process to move other district courts to terminate legacy antitrust judgments. *See, e.g., United States v. Am. Amusement Ticket Mfrs. Ass'n*, Case 1:18-mc-00091 (D.D.C. Aug. 15, 2018) (terminating nineteen judgments); *In re: Termination of Legacy Antitrust Judgments*, No. 2:18-mc-00033 (E.D. Va. Nov. 21, 2018) (terminating five judgments); *United States v. The Wachovia Corp. and Am. Credit Corp.*, Case No. 3:75CV2656-FDW-DSC (W.D.N.C. Dec. 17, 2018) (terminating one judgment); *United States v. Capital Glass & Trim Co., et al.*, Case No. 3679N (M.D. Ala. Dec. 17, 2018) (terminating one judgment); *United States v. Standard Sanitary Mfg. Co., et al.*, Case 1:19-mc-00069-RDB (D. Md. Feb. 7, 2019) (terminating nine judgments).

II. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENTS

This Court has jurisdiction and authority to terminate the judgments in the above-captioned cases. Each judgment, a copy of which is included in Appendix A, provides that the Court retains jurisdiction. In addition, the Federal Rules of Civil Procedure grant the Court authority to terminate each judgment. Rule 60(b)(5) and (b)(6) provides that, "[o]n motion and just terms, the court may relieve a party . . . from a final judgment . . . (5) [when] applying it prospectively is no longer equitable; or (6) for any other reason that justifies relief." Fed. R. Civ. P. 60(b)(5)-(6); *see also Frew v. Hawkins*, 540 U.S. 431, 441 (2004) (explaining that Rule 60(b)(5) "encompasses the traditional power of a court of equity to modify its decree in light of changed circumstances" and that "district courts should apply a 'flexible standard' to the modification of consent decrees when a significant change in facts or law warrants their amendment"); *Bldg. & Constr. Trades Council v. NLRB*, 64 F.3d 880, 887-88 (3d Cir. 1995) (holding that "the generally applicable rule for modifying a previously issued judgment is that set forth in Rule 60(b)(5), *i.e.*, that it is no longer equitable that the judgment should have prospective application," and instructing that "equity demands a flexible response to the unique conditions of each case"). Thus, the Court may terminate each judgment for any reason that justifies relief, including that the judgment no longer

serves its original purpose of protecting competition.[6] Termination of these judgments is warranted.

III. ARGUMENT

It is appropriate to terminate the perpetual judgments in each the above-captioned cases because they no longer serve their original purpose of protecting competition. The United States believes that the judgments presumptively should be terminated because their age alone suggests they no longer protect competition. Other reasons, however, also weigh in favor of terminating them. Under such circumstances, the Court may terminate the judgments pursuant to Rule 60(b)(5) or (b)(6) of the Federal Rules of Civil Procedure.

A. The Judgments Presumptively Should Be Terminated Because of Their Age

Permanent antitrust injunctions rarely serve to protect competition. The experience of the United States in enforcing the antitrust laws has shown that markets almost always evolve over time in response to competitive and

[6] In light of the circumstances surrounding the judgments for which it seeks termination, the United States does not believe it is necessary for the Court to make an extensive inquiry into the facts of each judgment to terminate them under Fed. R. Civ. P. 60(b)(5) or (b)(6). All of these judgments would have terminated long ago if the Antitrust Division had the foresight to limit them to ten years in duration as under its policy adopted in 1979. Moreover, the passage of decades and changed circumstance since their entry, as described in this memorandum, means that it is likely that the judgments no longer serve their original purpose of protecting competition.

technological changes. These changes may make the prohibitions of decades-old judgments either irrelevant to, or inconsistent with, competition. These considerations, among others, led the Antitrust Division in 1979 to establish its policy of generally including in each judgment a term automatically terminating the judgment after no more than ten years.[7] The judgments in the above-captioned matters—all of which are decades old—presumptively should be terminated for the reasons that led the Antitrust Division to adopt its 1979 policy of generally limiting judgments to a term of ten years.

B. The Judgments Should Be Terminated Because They Are Unnecessary

In addition to age, other reasons weigh heavily in favor of terminating each judgment. Based on its examination of the judgments, the Antitrust Division has determined that each should be terminated for one or more of the following reasons:

- All requirements of the judgment have been met such that it has been satisfied in full. In such a case, termination of the judgment is a housekeeping action: it will allow the Court to clear its docket of a judgment that should have been terminated long ago but for the failure to include a term automatically terminating it upon satisfaction of its terms.

[7] U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL at III-147 (5th ed. 2008), https://www.justice.gov/atr/division-manual.

- The judgment prohibits acts that the antitrust laws already prohibit, such as fixing prices, allocating markets, rigging bids, or engaging in group boycotts. These prohibitions amount to little more than an admonition that defendants must not violate the law. Absent such terms, defendants still are deterred from violating the law by the possibility of imprisonment, significant criminal fines, and treble damages in private follow-on litigation; a mere admonition to not violate the law adds little additional deterrence. To the extent a judgment includes terms that do little to deter anticompetitive acts, it should be terminated.
- The judgment contains provisions that relate to patents that expired more than a decade ago. Such terms no longer protect competition. To the extent a judgment contains provisions that relate to expired patents, it should be terminated.

Additional reasons specific to each judgment are set forth below:

1. *United States v. York Corp.*, Civil Action No. 7546

The judgment was entered in 1963. Jurisdiction was explicitly retained in Section VIII of the judgment. The judgment perpetually enjoins the defendant air conditioning equipment manufacturer from limiting, dividing, or restricting customers, territories, or markets for the sale of any York product; limiting, restricting, or preventing the resale or exportation of any York product; and

imposing any limitation or restriction upon the persons to whom, territories in which, or the use for which any person may sell or put any York product. The judgment should be terminated because its terms largely prohibit acts the antitrust laws already prohibit (market allocation).

2. *United States v. Anthracite Export Ass'n*, Civil Action No. 9171

The judgment was entered in 1970. Jurisdiction was explicitly retained in Section 2(I) of the judgment. The judgment, among other things, enjoins the defendants—the Anthracite Export Association, six of its member producers of anthracite coal, and two affiliated wholesalers of anthracite—from fixing the prices of anthracite to be offered or supplied to an Army program, allocating anthracite offered or supplied under the Army program, and rigging bids under the Army program. The judgment should be terminated because its terms largely prohibit acts the antitrust laws already prohibit (price fixing, bid rigging, market allocation).

3. *United States v. Am. Technical Indus., Inc.*, Civil Action No. 73-246

The judgment was entered in 1975. Jurisdiction was explicitly retained in Section VIII of the judgment. The judgment, which resolved the United States's challenge to the defendant artificial Christmas tree manufacturer's acquisition of another artificial Christmas tree manufacturer, (a) required the defendant to grant royalty-free licenses for ten specified patents related to the design, manufacture,

assembly, and sale of artificial Christmas trees; and (b) enjoined the defendant from, among other things, instituting or threatening any action for the infringement of the ten specified patents or acquiring any assets or stock of any person engaged in the sale of artificial Christmas trees in the United States. The judgment should be terminated because all requirements of the judgment have been met. An additional reason to terminate is that the judgment mandated that the defendant license certain patents that have long since expired; such terms no longer protect competition.

C. There Has Been No Public Opposition to Termination

The United States has provided adequate notice to the public regarding its intent to seek termination of the judgments. On April 25, 2018, the Antitrust Division issued a press release announcing its efforts to review and terminate legacy antitrust judgments.[8] On August 15, 2018, the Antitrust Division listed the judgments in the above-captioned cases on its public website, describing its intent to move to terminate the judgments.[9] The notice identified each case, linked to the judgment, and invited public comment. No comments were received.

---

[8] Press Release, *Department of Justice Announces Initiative to Terminate "Legacy" Antitrust Judgments*, U.S. DEP'T OF JUSTICE (April 25, 2018), https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments.

[9] *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/JudgmentTermination; *Judgment Termination Initiative: Middle*

IV. CONCLUSION

For the foregoing reasons, the United States believes termination of the judgments in each of the above-captioned cases is appropriate, and respectfully requests that the Court enter an order terminating them. A proposed order terminating the judgments in the above-captioned cases is attached as Appendix B.

Respectfully submitted,

Dated: April 9, 2019

/s/ Kerrie J. Freeborn

KERRIE J. FREEBORN (DC 503143)
United States Department of Justice
Antitrust Division
450 Fifth Street, N.W., Suite 8700
Washington, D.C. 20530
Tel: (202) 598-2300
Fax: (202) 514-9033
Email: kerrie.freeborn@usdoj.gov

District of Pennsylvania, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/judgment-termination-initiative-pennsylvania-middle-district (last updated Oct. 2, 2018).